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IN THE

Supreme Court of the United States

COLUMBIA GAS TRANSMISSION CORPORATION,

Petitioner,

v.

RICHARD A. LEVIN
TAX COMMISSIONER OF OHIO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

INTRODUCTION 1

CONCLUSION 12

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Am. Trucking Ass'ns v. Scheiner,
483 U.S. 266 (1987) 8

General Motors Corp. v. Tracy,
519 U.S. 278 (1997) ..... *passim*

Hunt v. Wash. State Apple Adver. Comm'n,
432 U.S. 333 (1977) 8

Or. Waste Waste Sys., Inc. v. Dep't of Envtl. Quality,
511 U.S. 93 (1994) 10

STATE CASES

In re CIG Field Services Co.,
279 Kan. 857 (2005) 1, 2, 8, 9

STATE STATUTES

OHIO REV. CODE ANN. § 5727.811 (West 2007) 10

INTRODUCTION

Despite State's assertions, this case does not involve "the application of settled law to a particular set of facts." Opp. at 1. Rather, the Ohio Supreme Court decision, while purporting to comply with *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), directly conflicts with both its language and its logic. Moreover, the Ohio court's understanding of *Tracy* cannot be squared with the Kansas Supreme Court's understanding of that decision as reflected in *In re CIG Field Services Co.*, 279 Kan. 857 (2005). The confusion engendered by the decision below matters greatly, as the Ohio Supreme Court's flawed Commerce Clause analysis threatens to frustrate Congress's stated intent of creating a "competitive, national market" for natural gas.

The Commerce Clause prevents States from putting a thumb on the competitive scales in favor of local competitors. The State cannot deny that the tax scheme here does just that—Ohio's personal property tax scheme taxes pipeline equipment owned by interstate pipeline companies at nearly four times the rate that applies to identical equipment owned by local distribution companies (LDCs). This tax differential systematically disadvantages interstate pipeline companies in the various markets in which they directly compete against LDCs. The Ohio Supreme Court upheld this tax scheme only because that court read *Tracy* as essentially creating a per se rule under which States have a blank check to discriminate in favor of LDCs.

Correctly understood, however, *Tracy* says no such thing. Rather, *Tracy* created a narrow exception to traditional Commerce Clause nondiscrimination

principles, under which Ohio was allowed to treat LDCs differently because, at the time that *Tracy* was decided, in addition to competing in the market at issue there, the LDCs also served as sole suppliers in a captive, noncompetitive residential market in Ohio. As the State admits, the captive, noncompetitive residential market for natural gas no longer exists in Ohio. LDCs compete with gas suppliers in the residential market, just as they compete with interstate pipelines companies for the various transportation services outlined in the petition.

Thus, the question this case presents is whether the natural gas industry will forever be exempt from normal Commerce Clause principles, such that States will forever be allowed to discriminate in favor of local distribution companies and against the LDCs' interstate competitors, even when the market conditions that originally legitimized that discrimination no longer exist. *Tracy* suggests no reason why that should be the case, nor does *In re CIG* understand *Tracy* that way. The court below, however, clearly did. Only this Court can resolve that conflict, a conflict that threatens to imperil efforts to achieve the "integrated and efficient pipeline grid" that Congress and FERC have determined is vital to serving our nation's energy needs.

1. The State's attempt to resolve the conflict between the decision below and *Tracy* falls flat. The State claims that *Tracy*'s willingness to depart from traditional Commerce Clause nondiscrimination principles did not rest on concerns about the LDCs' unique role as sole supplier to the noncompetitive, captive residential market, but rather that the existence of this captive, noncompetitive market was

merely one of "several factors" underlying *Tracy*. Opp. at 5–8. The very portions of *Tracy* that the State cites, however, show the flaw in this argument.

a. Each of the three *Tracy* passages on which the State relies expressly refers to the importance of avoiding harm to the "noncompetitive, captive market." Opp. at 6, 7. Indeed, as the brief in opposition notes, the Court saw its task in *Tracy* as deciding whether to "'accord controlling significance to the noncaptive market in which [LDCs] compete, or to the noncompetitive, captive market in which the local utilities alone operate.'" Opp. at 6, quoting *Tracy*, 519 U.S. at 303. That dichotomy—between (1) a "noncaptive market in which LDCs compete" and (2) a "noncompetitive, captive market in which the [LDCs] alone operate"—no longer exists in Ohio. See Opp. at 11 (acknowledging that "Ohio now allows independent natural gas marketers to compete with LDCs in the retail sale of natural gas to residential and business customers").

Thus, the State is simply wrong (as was the court below) to rely on *Tracy*'s concerns about "'proceed[ing] cautiously lest we imperil the delivery by regulated LDCs of bundled gas to the noncompetitive captive market,'" see Opp. at 6–7, quoting *Tracy*, 519 U.S. at 304, as justification for the discrimination here. No such market exists.

b. The State fares no better in resting its argument on the Court's observation in *Tracy* that Congress is better suited to the task of "'strik[ing] the balance between the needs of the competitive and captive markets.'" Opp. at 7, quoting *Tracy*, 519 U.S. at 304. It is particularly befuddling that the State insists that *Tracy*'s reference to Congress's

comparative advantage in balancing needs between competitive and captive markets "is not affected by the presence of competition" in the formerly captive markets. Opp. at 7. Of course it is—when there is no captive market, there is no need to strike a balance between competitive and captive markets. LDCs now compete with independent gas marketers to supply gas in the residential market in Ohio, just as they compete with interstate pipeline companies in the various markets the petition identified. Thus, viewing *Tracy* as a case about Congress's comparative institutional advantage in balancing between competitive and captive markets does not even address, let alone resolve, the conflict that exists between *Tracy* and the decision below.

Moreover, even if *Tracy* stresses the importance of close attention to congressional policy choices in this area, such attention favors Columbia Transmission. For it is the State, not Columbia Transmission, that seeks to contravene Congress's choices. Congress has repeatedly determined, most recently in the Energy Policy Act of 2005, that the national interest is best served by a competitive, nationwide gas market and by increased investment in gas infrastructure. See Pet. at 23–29. A Commerce Clause jurisprudence, like the one adopted below here, that permits States unfettered discretion to discriminate in favor of local utilities at the expense of their interstate competitors, directly impedes the achievement of those national goals.

2. The State similarly fails in its attempt to resolve the conflict with *Tracy* by asserting that the LDCs are subject to unique regulatory obligations and thus are not "similarly situated." See Opp. at 8–

10. Indeed, its argument fails both on the law and the facts. As to the former, *Tracy* did not point to alleged regulatory differences as the basis for its holding that LDCs were not similarly situated to independent marketers. Rather, the Court's holding cited the fact that the former participated in a "noncompetitive, captive market," while the latter did not, as the basis for distinction. As noted above, that difference no longer exists in Ohio. Nor did the Ohio Supreme Court's decision rest on alleged regulatory differences. While it may have noted in passing that such differences exist, its decision on substantial similarity turned solely on the fact that interstate pipeline companies do not compete in the residential market.

To be sure, the Court could *change* Commerce Clause jurisprudence in this area to instead focus on the regulatory framework as the basis for the "similarly situated" analysis, but the State is wrong to suggest that either *Tracy* or the decision below somehow both reflect that analysis. Indeed, the uncertain role that alleged regulatory differences play merely serves to highlight the confusion that requires the Court's attention.

In any event, on the facts here, the alleged regulatory differences fail to reconcile the conflict. As Columbia Transmission explained in its briefing below, while it is not subject to the Ohio regulations that the State cited, it is subject to various similar federal regulatory burdens. Columbia Trans. Ohio Sup. Ct. Br. at 3. Thus, regulatory differences alone, even if they could suffice to show that two entities are not similarly situated under *Tracy*, do not do so here. In sum, the decision below creates substantial

confusion as to what *Tracy* means, confusion that only this Court can resolve.

3. The State's next argument—that independent marketers and LDCs are not similarly situated for Commerce Clause purposes—misses the point. See Opp. at 10–13. Columbia Transmission is not asserting that *independent marketers* are similarly situated to LDCs (after all, as the State notes, see Opp. at 12, Columbia Transmission is not an independent marketer, but an interstate pipeline company). Rather, Columbia Transmission's argument is (1) that *interstate pipeline companies* and LDCs are similarly situated in that they directly compete in various markets; (2) that interstate pipeline companies are systematically disadvantaged in that competition by Ohio's discriminatory tax scheme; and (3) that Ohio can no longer point to the existence of a separate "noncompetitive, captive market," see *Tracy*, as a basis to justify that discrimination. Thus, the point is not that independent marketers are *similarly situated* to LDCs (although they likely are), but rather that the independent marketers are *directly competing* with LDCs in the residential market, meaning that market is no longer a "noncompetitive, captive market" as it was when *Tracy* was decided. And, with regard to *that* point, the State concedes that Columbia Transmission is correct. See Opp. at 11.

4. The State's argument that competition in the various markets that Columbia Transmission identified does not matter, because this competition does not occur in the LDCs' "core market," see Opp. at 13–17, is circular. To be sure, *Tracy* held that when LDCs compete in one market, but are also sole

suppliers of gas to a "noncompetitive, captive market," the existence of the latter market insulates them from being "similarly situated" with competitors in the former market for Commerce Clause purposes. But, as Columbia Transmission explained (both in the Petition and above), that holding turned on *the existence of a noncompetitive, captive market that no longer exists.* That is, *Tracy* did not identify the residential market as having special significance because the market was *residential*, but rather because that market was a *noncompetitive, captive* market. Thus, the State's claim that the residential market is "core," and that other markets are "marginal," for purposes of the Commerce Clause analysis reflects the same misplaced view of *Tracy* adopted by the court below. Merely reiterating that view, as the State does here, neither justifies it, nor does it overcome the need for certiorari to correct that flawed view before it spreads more widely, thereby interfering with the Congress's desire to build a "competitive, national market."

The State similarly fails in its efforts to advance its case by mischaracterizing Columbia Transmission's argument. Contrary to the State's suggestion, Columbia Transmission does not contend that LDCs and interstate pipeline companies are "similarly situated" merely because they happen to use "functionally identical equipment." Opp. at 17. Rather, the gist of Columbia Transmission's argument is that these two groups are similarly situated in that they use functionally identical equipment *to directly compete with one another.* Thus, contrary to the State's claim, Columbia Transmission does not contend that an "unregulated apple-delivery business" is similarly situated to a

"heavily-regulated orange-delivery business" merely because they both use delivery trucks. Opp. at 17. Rather, Columbia Transmission's claim is that if an in-state and an interstate apple-delivery business both use trucks to compete with one another in delivering fruit in the State, the State could not elect to tax the interstate carrier at a higher rate than the in-state competitor. See *Am. Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987) (invalidating tax that discriminatorily impacted interstate truckers). In other words, the issue here is not apples to oranges, but "local apples" to "interstate apples." See *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977) (striking on Commerce Clause grounds a North Carolina statute that discriminated against Washington apples).

5. The State similarly fails to resolve the conflict between the decision below and the Kansas Supreme Court's decision in *In re CIG Field Services, Co.*, 279 Kan. 857 (2005). As the State acknowledges, the Kansas court found that the similarly-situated inquiry turned on whether there was "competition between the supposedly favored and disfavored entities in a single market." Opp. at 18, quoting *CIG*, 112 P.3d at 146, in turn quoting *Tracy*, 519 U.S. at 300. Applying that test here, of course, would result in a finding that LDCs and interstate pipeline companies *are* similarly situated, for no one meaningfully disputes that these two groups compete in some markets. Thus, the tests announced by the Kansas and Ohio courts are fundamentally incompatible.

The State, however, claims that there is no conflict because the Kansas case involved "intracounty and

intercounty systems," while the case below involved "intrastate and interstate counterparts." Opp. at 19. That is a distinction without a difference. Indeed, if anything, the discrimination here is more egregious from a Commerce Clause perspective. The categories in *In re CIG*, while clearly having a differential *impact* on interstate commerce (all single county businesses are necessarily in-state, while intercounty businesses may or may not be located in a single state), did not directly correspond to the in-state/interstate distinction in the way that the categories at issue here (local distribution company vs. interstate pipeline company) do.

Nor does the State's reference to *In re CIG*'s reliance on agency fact findings cure the split. Opp. at 19. To be sure, the Kansas court pointed to the agency's finding of "substantial, competent evidence" that competition existed in various markets. But the State here is not meaningfully disputing (nor did the court below) that LDCs and interstate pipeline companies compete in at least some markets. See Opp. at 16 (admitting "the possibility, or even reality, of minor competition in other markets"); Pet. App. at 25a (not denying evidence of competition, but rather claiming that "the existence of other areas of actual or potential competition" does not matter under *Tracy*).

In short, factual disputes do not distinguish this case from *In re CIG*. Rather, the dispute is whether the Ohio court is correct that *Tracy* has forever imbued the residential market with special significance in Commerce Clause jurisprudence, even if that market is no longer a "noncompetitive, captive market."

6. The compensatory tax issue the State raises is a red herring. See Opp. at 20. The MCF tax to which the State refers applies to gas delivered through meters to end users. See OHIO REV. CODE ANN. § 5727.811 (West 2007) (tax applies to "natural gas distributed by the company through a meter of an end user in this state"). The tax is thus not the same type of tax (i.e., a personal property tax) as the tax at issue here. Moreover, as a transactional tax on deliveries to end users, it does not apply to gas that an LDC transports to another LDC, or that an LDC transports to gas storage sites, nor does it apply to gas that travels though an LDC's pipes in gathering operations. That is, the tax does not apply to many of the areas in which LDCs directly compete with interstate pipeline companies. A different type of tax on a different component of the business—deliveries to end users—cannot serve as a compensating tax for services provided in the nonresidential markets. See *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 105 (1994) (discriminatory tax on utilizing Oregon landfills could not be justified by difference in income tax, as they were "entirely different kinds of taxes").

7. The State's claim that the Natural Gas Act (NGA) somehow reflects congressional approval of the state discrimination here also fails. See Opp. at 23–25. To start, the State never briefed or argued that issue below. But, more importantly, the State is wrong that the NGA insulates the States from Commerce Clause scrutiny with regard to the tax here. The purpose of the NGA is to establish the dividing line between state and federal regulatory authority over natural gas transmission and distribution. The NGA authorizes the federal

government to regulate *interstate* natural gas activities and assigns primary regulatory responsibility to the States for *local* distribution. Thus, the discriminatory tax at issue in *Tracy*, a sales tax on the local sale of natural gas to end users, fell squarely within the activities that the NGA had assigned to State oversight. The tax at issue here, however, which applies, *inter alia*, to interstate pipelines that traverse Ohio, does not fall within the realm of exclusive State authority. And, nothing in the NGA suggests that Congress intended interstate transmission pipelines to be subject to discriminatory State taxation. In short, whether the Court's fleeting dicta on the unbriefed NGA issue in *Tracy* is ultimately correct or not, that dicta offers no guidance on the very different question here, and presents no reason for the Court not to take this case.

As more fully explained in the Petition, see Pet. at 23–29, Congress has consistently recognized the importance of encouraging natural gas infrastructure development. Confusion regarding the limits on the States' ability to discriminatorily tax that natural gas infrastructure creates strong disincentives to investment. This case presents an ideal vehicle for the Court to remedy that confusion. Accordingly, Columbia Transmission urges the Court to grant certiorari.

CONCLUSION

For the reasons stated in the Petition and above, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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